

No. 149798

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IN THE  
MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

*Plaintiff-Appellee*

-vs-

TIMOTHY JACKSON,

*Defendant-Appellant,*

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ON APPEAL FROM THE THIRD JUDICIAL CIRCUIT COURT

WAYNE COUNTY CRIMINAL DIVISION

Circuit Court No. 10-13476-01

Court of Appeals No. 310177

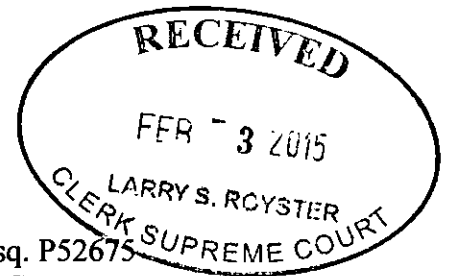
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**DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
ARGUMENT.....	1
<b>A. THE CHALLENGED TESTIMONY OF JACKLYN PRICE REGARDING         DEFENDANT’S PRIOR SEXUAL RELATIONSHIPS WAS NOT         ADMISSIBLE <i>RES GESTAE</i> EVIDENCE.....</b>	<b>1</b>
<b>B. BECAUSE THE CHALLENGED EVIDENCE WAS NOT ADMISSIBLE         RES GESTAE EVIDENCE, THE PROSECUTOR WAS REQUIRED TO         PROVIDE A PROPER PURPOSE AND NOTICE PURSUANT TO MRE         404(B).....</b>	<b>4</b>
<b>C. THE PROSECUTOR’S FAILURE TO PROVIDE A PROPER PURPOSE         AND NOTICE PURSUANT TO MRE 404 WAS PREJUDICIAL ERROR         WARRANTING REVERSAL.....</b>	<b>6</b>
CONCLUSION.....	8

## **TABLE OF AUTHORITIES**

### **United States Constitution**

Const 1963, art 1, § 17; US Const, Am XIV.....7

### **Federal Circuit Court**

*United States v. Boone*, 628 F.3d 927 (7th Cir. 2010).....3

*United States v. Bowie*, 232 F.3d 923 (D.C. Cir. 2000).....2,3

*United States v. Green*, 617 F.3d 233 (3d Cir. 2010).....2

*United States v. Hall*, 604 F.3d 539 (8th Cir. 2010).....2

*United States v. Wright*, 392 F.3d 1269 (11th Cir. 2004).....2

### **Michigan Supreme Court**

*People v Allen*, 429 Mich 558; 420 N.W.2d 499 (1988).....7

*People v Carines*, 460 Mich 750; 597 N.W.2d 130 (1999).....6,7

*People v Delgado*, 404 Mich 76; 273 N.W.2d 395 (1978).....3

*People v Kayne*, 268 Mich 186; 255 N.W. 758 (1934).....3

*People v Knox*, 469 Mich 502; 674 N.W.2d 366 (2004).....5

*People v. Major*, 407 Mich. 394; 285 N.W.2d 660 (1979).....1

*People v Sholl*, 453 Mich 730; 556 N.W.2d 851 (1996).....3

### **Other Case Law**

*People v Albers*, 258 Mich.App. 578; 672 N.W.2d 336 (2003).....5

*People v Hawkins*, 245 Mich.App. 439; 628 N.W.2d 105 (2001).....4,5,6

*People v Ortiz-Kehoe*, 237 Mich.App. 508; 603 N.W.2d 802 (1999),  
lv den 461 Mich 957 (2000).....7

*People v. Malone*, 287 Mich. App. 648; 792 N.W.2d 7, 17 (2010).....4

*People v Sheehy*, 31 Mich.App. 628; 188 N.W.2d 231 (1971).....4

*People v. Smith*, 119 Mich.App. 431; 326 N.W.2d 533 (1982).....1,2

<i>People v Stoker</i> , 103 Mich.App. 800; 303 N.W.2d 900 (1981).....	4
<i>People v Ullah</i> , 216 Mich.App. 669; 550 N.W.2d 568 (1996).....	4
<i>State v. Rose</i> , 206 N.J. 141, 19 A.3d 985 (2011).....	3
<i>Stirling v Buckingham</i> , 46 Conn 461 (1878).....	3

#### **Other Authorities**

1 Uncharged Misconduct Evidence § 1:2.....	7
Leibman, <i>The ‘Inextricably Intertwined’ Doctrine: No Longer a Reliable Prosecutorial</i> <i>Standby?</i> , 89 CrL 99 (2011).....	3
MRE 404.....	<i>passim</i>

## **INTRODUCTION**

On December 23, 2014, this Honorable Court ordered the application for leave to appeal the April 10, 2014 judgment of the Court of Appeals be considered and further ordered the parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the challenged testimony of Jacklyn Price regarding the defendant's prior sexual relationships was admissible res gestae evidence; (2) if so, whether the prosecutor was required to provide notice pursuant to MRE 404(b)(2); and (3) whether, if notice was required, any failure in this regard was prejudicial error warranting reversal. This brief supplements and addresses these questions only. Mr. Jackson denies all the allegations made against him and respectfully requests this Court find the improperly admitted other acts evidence presented at trial to be so prejudicial that reversal of his criminal sexual conduct convictions is mandated.

## **ARGUMENT**

### **A. THE CHALLENGED TESTIMONY OF JACKLYN PRICE REGARDING DEFENDANT'S PRIOR SEXUAL RELATIONSHIPS WAS NOT ADMISSIBLE RES GESTAE EVIDENCE**

MRE 404 generally forbids character evidence used to prove an actor's conformity therewith on a particular occasion. However, "'similar acts' evidence may be admitted under MRE 404(b), which allows evidence of other crimes, wrongs or acts committed by the defendant to be admitted for limited specified purposes." *People v. Smith*, 119 Mich.App. 431, 434; 326 N.W.2d 533 (1982). "Similar acts" evidence "must qualify for admissibility on two levels: 1) It must be probative of one or more of the statutorily specified purposes, and 2) one or more of those purposes must be material, that is, a proposition 'in issue' in the case." *People v. Major*, 407 Mich. 394, 398; 285 N.W.2d 660 (1979). Mr. Jackson has maintained his innocence and

vehemently denies all the allegations leveled against him. “A mere general denial by the defendant is insufficient to place matters such as motive, intent, identity, scheme, plan, preparation or absence of mistake in issue.” *Smith*, 119 Mich.App. at 435. The prosecution in the instant case has wholly failed to articulate a proper purpose for the testimony of Ms. Price under MRE 404. However, Michigan courts have acknowledged an alternative route to having this type of testimony admitted; the *res gestae* exception.

The *res gestae* exception, also referred to as the “inextricably intertwined” principle, has proven to be a rather esoteric concept. Both state and federal courts have struggled to apply the exception,<sup>1</sup> resulting in disparate approaches. Compare *United States v. Wright*, 392 F.3d 1269, 1276 (11th Cir. 2004) (evidence is “inextricably intertwined” if it is “not part of the crime charged but pertain[s] to the chain of events explaining the context” of the crime; or is “linked in time and circumstances with the charged crime”; or “forms an integral and natural part of an account of the crime”; or “complete[s] the story of the crime for the jury”); and *United States v. Hall*, 604 F.3d 539, 543 (8th Cir. 2010) (evidence inextricably intertwined if it is “an integral part of the immediate context of the crime charged”).

While different courts apply different variations of the test, the common thread relates to the prosecutor’s ability to tell a complete story. However, “all relevant prosecution evidence explains the crime or completes the story [and] [t]he fact that omitting some evidence would render a story slightly less complete cannot justify circumventing Rule 404(b) altogether.”

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<sup>1</sup> See *United States v. Green*, 617 F.3d 233 (3d Cir. 2010). In *Green*, the court noted that the test causes confusion “because, quite simply, no one knows what it means.” *Id.* at 246. The court went on to note that the test was “vague, overbroad, and prone to abuse, and [they could not] ignore the danger it poses to the vitality of Rule 404(b).” *Id.* at 248.

*United States v. Bowie*, 232 F.3d 923, 929 (D.C. Cir. 2000).<sup>2</sup> Courts are clearly uncomfortable with the doctrine and its ability to be manipulated by the prosecution to avoid the mandates of rule 404. See *United States v. Boone*, 628 F.3d 927, 933 (7th Cir. 2010) (acknowledging that the Seventh Circuit views the doctrine as having “outlived its usefulness” and that it was “unavailable when determining a theory of admissibility”). The modern trend is moving away from allowing evidence of “other acts” under the res gestae or “inextricably intertwined” doctrine<sup>3</sup> and instead requiring that such evidence comply with the strictures of MRE 404(b), including pretrial notice. See *State v. Rose*, 206 N.J. 141, 182, 19 A.3d 985, 1011 (2011) (rejecting the res gestae exception and requiring New Jersey courts to rely solely on the rules of evidence in ruling on issues of admissibility).

To date, Michigan still recognizes the exception and its formulation of the exception is not unique. Our courts have held that res gestae evidence “is admissible when so closely connected with the crime of which defendant is accused as to constitute an explanation of the circumstances of the crime.” *People v Sholl*, 453 Mich 730, 742; 556 N.W.2d 851 (1996) (citing *People v Delgado*, 404 Mich 76, 83; 273 N.W.2d 395 (1978) (internal citations omitted)). They “are contemporaneous with it, and serve to illustrate its character.” *People v Kayne*, 268 Mich 186, 191; 255 N.W. 758 (1934) (quoting *Stirling v Buckingham*, 46 Conn 461 (1878)). To be admitted as part of the res gestae, facts to be proven must be proximate in time to the principal

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<sup>2</sup> The court went on to reason that “there is no general ‘complete the story’ or ‘explain the circumstances’ exception to Rule 404(b) in this Circuit [and that] [s]uch broad exclusions have no discernible grounding in the ‘other crimes, wrongs, or acts’ language of the rule. Rule 404(b), and particularly its notice requirement, should not be disregarded on such a flimsy basis.” *Bowie*, 232 F.3d at 929.

<sup>3</sup> See generally Leibman, *The ‘Inextricably Intertwined’ Doctrine: No Longer a Reliable Prosecutorial Standby?*, 89 CrL 99 (2011).

fact and also illustrate and characterize the principal fact. *People v Sheehy*, 31 Mich.App. 628, 630; 188 N.W.2d 231 (1971). Moreover, it is necessary as a bare minimum for admitting evidence as part of the res gestae exception that it be directly linked to the events in question. The link may not be “circumstantial” or “speculative.” *People v Stoker*, 103 Mich.App. 800, 808; 303 N.W.2d 900 (1981).

In the instant case, Ms. Price’s testimony regarding Mr. Jackson’s other allegedly inappropriate relationships with parishioners was neither relevant nor part of the res gestae of the offense charged. This testimony regarding alleged prior extramarital trysts involving the defendant are completely unrelated to the offense charged and did not happen contemporaneously with the offense charged. Ms. Price’s reference to these alleged acts do not qualify for the res gestae exception. Should this Court interpret the exception broadly and conclude otherwise, the exception will stretch to such a point that it would effectively subsume MRE 404 and give prosecutors carte blanche to circumvent the strictures of the rule.

**B. BECAUSE THE CHALLENGED EVIDENCE WAS NOT  
ADMISSIBLE RES GESTAE EVIDENCE, THE PROSECUTOR  
WAS REQUIRED TO PROVIDE A PROPER PURPOSE AND  
NOTICE PURSUANT TO MRE 404(B)<sup>4</sup>**

The other-acts testimony of Ms. Price was improper for two other reasons. First, it was improper because the prosecution never gave the notice required by MRE 404(b)(2). *See People v Hawkins*, 245 Mich.App. 439, 453-56; 628 N.W.2d 105 (2001); *People v Ullah*, 216 Mich.App. 669, 676; 550 N.W.2d 568 (1996). Second, it was improper because there was no

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<sup>4</sup> While this Court in its December 23, 2014 Order asked the parties to brief whether notice under MRE 404(b)(2) is required for evidence that qualifies for the res gestae exception, it is clear that notice is not required in such a situation. *People v. Malone*, 287 Mich. App. 648, 662, 792 N.W.2d 7, 17 (2010).



non-character/propensity purpose for the testimony regarding previous relationships, as required by MRE 404(b)(1).

MRE 404(b) reads as follows:

- (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.
- (2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

The second part of this rule requires the “prosecution in a criminal case” to “provide reasonable notice in advance of trial” of its intent to offer other-acts evidence, or else show “good cause” why notice was not given. MRE 404(b)(2). The “essential value and underlying aims” of the notice rule are:

(1) to force the prosecutor to identify and seek admission only of prior bad acts evidence that passes the relevancy threshold, (2) to ensure that the defendant has an opportunity to object to and defend against this sort of evidence, and (3) to facilitate a thoughtful ruling by the trial court that either admits or excludes this evidence and is grounded in an adequate record. [*People v Hawkins*, 245 Mich.App. 439, 454-55; 628 N.W.2d 105 (2001)].

Further, other-acts evidence must be probative of something other than propensity to commit the crime. *People v Knox*, 469 Mich 502, 511; 674 N.W.2d 366 (2004); *People v Albers*, 258 Mich.App. 578, 588; 672 N.W.2d 336 (2003). Proper purposes include “motive, intent,

preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident[.]” MRE 404(b)(1).

The testimony of Ms. Price was not admissible *res gestae* evidence. The prosecutor failed to provide the requisite notice and they have failed to articulate a proper, non-propensity, use for the testimony. As the following section makes clear, the trial court’s failure to exclude the testimony of Ms. Price despite these deficiencies was prejudicial error warranting reversal.

**C. THE PROSECUTOR’S FAILURE TO PROVIDE A PROPER  
PURPOSE AND NOTICE PURSUANT TO MRE 404 WAS  
PREJUDICIAL ERROR WARRANTING REVERSAL**

This Court should reverse because the error cited herein undermined the fairness, integrity, and public reputation of the judicial proceedings. *See People v Carines*, 460 Mich 750, 763-64; 597 N.W.2d 130 (1999). First, prejudice resulted from the prosecutor’s failure to provide advance notice of their intent to introduce other-acts evidence at trial. Comparison to *Hawkins, supra*, shows why. In *Hawkins*, the Court of Appeals held that a prosecutor’s failure to give pretrial notice before eliciting other-acts testimony constitutes plain error. *Hawkins*, 245 Mich.App. at 453. That court, however, declined to reverse. *Id.* at 455-56. It did so because, given the seeming admissibility of the evidence and the lack of reason for thinking that notice might have allowed the defense to oppose it successfully, the error in that particular case appeared to be harmless. *Id.* at 455-56.

In the instant case, however, the other-acts evidence itself undermined the fairness of the trial. Evidence implicating the defendant in other bad acts has a devastating effect on the jury’s deliberations. As Professor Imwinkelreid explains:

Experienced trial attorneys know that the judge’s ruling on the admission of uncharged misconduct can be the turning point in a

trial. *Uncharged misconduct evidence 'will usually sink the defense without [a] trace.'* Some veteran defense attorneys shape their entire trial strategy to avoid the admission of uncharged misconduct evidence.

The available research data confirms this belief. . . . [T]he admission of a defendant's uncharged misconduct significantly increases the likelihood of a jury finding of liability or guilt. . . . *[A]s a practical matter, the presumption of innocence operates only for defendants without prior criminal records. Evidence of uncharged misconduct strips the defendant of the presumption of innocence.*

1 Uncharged Misconduct Evidence § 1:2 (citations omitted) (emphasis added). Indeed, other-acts evidence is likely to be misused by the jury in at least three different ways, as this Court recognized in *People v Allen*, 429 Mich 558, 569; 420 N.W.2d 499 (1988):

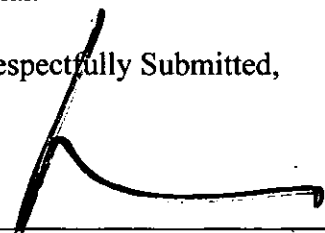
First, that jurors may determine that although defendant's guilt in the case before them is in doubt, he is a bad man and should therefore be punished. Second, the character evidence may lead the jury to lower the burden of proof against the defendant, since, even if the guilty verdict is incorrect, no 'innocent' man will be forced to endure punishment. Third, the jury may determine that on the basis of his prior actions, the defendant has a propensity to commit crimes, and therefore he probably is guilty of the crime with which he is charged.

Where a jury has heard inadmissible testimony, a trial court should grant a mistrial "only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Ortiz-Kehoe*, 237 Mich.App. 508, 513-514; 603 N.W.2d 802 (1999), lv den 461 Mich 957 (2000). In a case such as this, where the jury's verdict rests on the credibility of the complainant and the defendant, any evidence improperly admitted to besmirch the defendant is prejudicial. Disclosure of Mr. Jackson's alleged prior inappropriate relationships with parishioners likely caused the jury to perceive Mr. Jackson as a sexual predator who should be imprisoned in order to prevent him from committing future crimes. This rendered Mr. Jackson's trial fundamentally unfair. See generally, *Carines*, 460 Mich at 774. For these reasons, due process requires a new trial. Const 1963, art 1, § 17; US Const, Am XIV.

**CONCLUSION**

WHEREFORE Defendant asks this Court to reverse the decision of the lower court and remand the matter back to the circuit court for a new trial.

Respectfully Submitted,



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**IN THE SUPREME COURT**

**(On Application for Leave to Appeal from the Court of Appeals)**

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Supreme Court Case No. 149798

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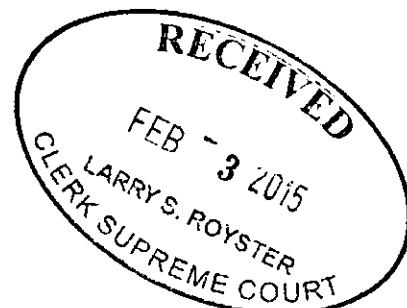
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**PROOF OF SERVICE**

*February 2, 2015*  
The undersigned states that on ~~September 26, 2014~~ she served copies of *Defendant-Appellant Timothy Ward Jackson's Supplemental Brief* and this *Proof of Service* by depositing in the U.S. mail, postage fully paid, to the attorneys of record referenced above.

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RE: People v. Timothy Ward Jackson  
No. 149798  
COA No. 310177  
WCCC No. 10-13476

Dear Mr. Clerk:

Enclosed please find an original and 9 copies of Defendant-Appellant's Supplemental Brief and Proof of Service for filing in the above-captioned matter. Please date stamp two of them and return to me in the enclosed postage paid envelope.

If you have any questions, please do not hesitate to call.

Sincerely,

  
Lisa B. Kirsch Satawa

CC: Timothy Jackson

